COPY

Office - Supreme Court, U.
FILED
MAR 2 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE AND ARGUE BRIEF AMICUS CURIAE

CARL J. BATTER
910-17th Street, N. W.
Washington 6, D. C.
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE AND ARGUE BRIEF AMICUS CURIAE

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COMES NOW, Carl J. Batter, a member of the bar of this Court and formerly Counsel of Record in the above case, and who has since, on March 11th, withdrawn as such Counsel; and

MOVES THE COURT for leave to file a brief *amicus curiae* in the above cause; and to be granted time to argue the question of law raised; and

time enact these specific criminal provisions; they simply carried over from 1924 into the 1939 Code. Congress merely duplicated these identical criminal provisions in Section 146 of the 1928 Revenue Act and Section 145 of the later Revenue Acts and in the 1939 Code. There being no "specific enactments" during this period, there could be no implied repeal.

By breaking Section 3179 into two parts (Section 3616(a) and (b)), and placing these two subsections under the "General and Administrative" heading of the 1939 Code, the codifiers emphasized the application of these two subsections to all forms of taxes.

As was pointed out in the Petitioner's reply brief, the history of Section 3616(a) of the Internal Revenue Code of 1939 has been set forth and defined by the Congress itself. In enacting the Internal Revenue Code of 1939, Congress expressly stated the ancestry of this provision. Section 3616(a), according to the Congress, was specifically derived from Section 3179 of the Revised Statutes, 53 Stat. App., xxxii, Table A, "Derivation of Internal Revenue Code;" and conversely, Section 3179 of the Revised Statutes was expressly noted, by the Congress, as being Section 3616(a) of the Internal Revenue Code of 1939. *Id.*, xl, Table B, "Statutes Included in the Internal Revenue Code."

In like fashion, the ancestry of Section 3179 of the Revised Statutes was plainly described by the Congress. That Section, according to the Congress, was derived directly from Section 15 of the Act of June 30, 1864, 13 Stat. 223, 227. Side note to Section 3179, Revised Statutes, 1874 Ed., 614, 1878 Ed., 611.

There is no further legislative history to Section 3616(a) or Section 3179 of the Revised Statutes. See

tion 3616(a) stems directly from Section 3179 of the Revised Statutes and the latter Section was derived directly from Section 15 of the Act of June 30, 1864. This is the message of the Congress; no other statutory history is relevant or appropriate.

This short and simple history indicates that from the beginning in 1864 to the end in 1939, Section 3616(a) and its predecessors clearly and always have been applicable to income tax. There is nothing in this history which suggests or gives rise to the need for "implied repeals" as was the conclusion of this Court in its Opinion. As this Court has recognized on many earlier occasions, such repeals are not favored, e.g., *United States* v. *Gilliland*, 312 U. S. 86, 96; *cf. Taylor v. United States* (CA 9), 179 F. 2d 640, 644. The clearly etched history of Section 3616(a) hardly justified the resort to an unfavored doctrine nor to a conclusion that "*ad hoc* enactments" eroded away a broad general permanent statutory provision.

II

As the Court well knows, this case was briefed and argued on a highly accelerated schedule. In addition, only a few days before Petitioner's brief was due, the Government suddenly announced its extraordinary change of view as to the meaning of Section 3616(a) in a mimeographed memorandum filed with this Court. In this fashion, and in the very midst of this litigation, it reversed the legal position which it had consistently followed for at least five years,* and in effect

---

* This Court's decision observes: "As long ago as 1926 it was the Government's position that the predecessor of § 145(b) effectively repealed § 3616(a)'s applicability to income tax evasion." See brief for the United States in *United States* v. *Norvell*, 273

confessed error in over 175 income tax evasion cases which it had prosecuted under 3616(a). In so doing, it also found new meaning in the same facts of legislative history it had used to support its prior view that Section 3616(a) applied to income tax.[7]

And the accelerated pace at which this litigation has been moving was not even slowed by this Court's decision of May 27, 1957. Only two days later, on May 29, 1957—and without waiting even for the filing, let alone disposition, of a petition for rehearing—the Justice Department announced that it had instructed United States Attorneys to dismiss or confess error in all income tax cases instituted under 3616(a). See *Flynn* v. *United States* (1955), 99 L. Ed. 1298, 1299. This release is set out in full as Appendix B to this Petition.

The questions posed by this case are too complex, and the consequences too far-reaching, to permit such precipitant and volatile action to be the basis for decision.

Aside from the errors in the decision, this case is, accordingly, one in which this Court's oft-repeated admonition seems particularly appropriate: that "to perform its high function in the best way 'justice

U. S. 202, pp. 16-19." But by citing a portion of a Government *brief*, the Court has permitted the Government twenty-one years later to pull itself up on its own bootstraps. Moreover, it is interesting to note that the decision of this Court in *Narcek* did not accept the Government's argument or even make reference to it.

[7] The "Appendix" setting forth the legislative history of Sections 145(b) and 3616(a), which had been routinely filed by the Government in the various cases raising the same point as the instant case is reproduced in full as Appendix A to this Petition. It is noteworthy that this "history" contains the same facts upon which the Government—and this Court—have now concluded that Section 3616(a) does not apply to income taxes; but was filed to support the view that 3616(a) was applicable to income tax. See particularly emphasized sentence at page 4a, Appendix.

must satisfy the appearance of justice'. *Offutt* v. *United States*, 348 U. S. 11." *In the Matters of Murchison and White*, 349 U. S. 133, 136.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a rehearing be granted in the instant case.

Respectfully submitted,

PETER B. ATWOOD,
10 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

Certificate of Counsel

I, PETER B. ATWOOD, counsel for Petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and sets forth good and sufficient grounds for rehearing.

PETER B. ATWOOD,
10 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

APPENDIX A

LEGISLATIVE HISTORY OF SECTIONS 145(b) AND 3616(a) OF THE INTERNAL REVENUE CODE OF 1939

In 1798 Congress first enacted a criminal statute punishing "any person [who] shall deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made."[1] Similar provisions appeared in various later revenue acts, including the first act (1861) imposing an income tax.[2] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[3] and in the 1864 act to include a "list, return, account or statement."[4] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. The 1870 act repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths, then required in connection with each return, under the penalties of perjury.[5] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes,[6] which, in turn later became Section

[1] Sec. 11, c. 70, 1 Stat. 580, 586.

[2] Secs. 16, 49-51, c. 45, 12 Stat. 292.

[3] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432.

[4] Act of June 30, 1864, as amended, Secs. 15, 116-123, 178, c. 173, 13 Stat. 223. This Act added the word "assessment" to valuation and "enumeration."

[5] Secs. 6, 11, 37, c. 255, 16 Stat. 256.

[6] Section 3179 reads as follows: "Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or, being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglect to appear or to produce said books,

3616(a) of the Internal Revenue Code of 1939. Since there was no income tax law in effect in 1874 it could not have been the intent of Congress at that time that Section 3179 should apply to income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same civil penalties that had been imposed by the 1870 act—50 per cent of the tax for a wilful failure to file and 100 per cent for the filing of a wilfully false or fraudulent return.[7] It would appear that in omitting any mention of criminal sanctions in the 1894 act Congress intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257 and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

The 1909 corporation income tax law specifically imposed maximum criminal penalties of one year in prison and a $1,000 fine for wilfully making a false or fraudulent return with intent to defeat or evade the assessment,[8] the same penalties contained in Section 3179. Four years later, however, Section II of the Revenue Act of 1913, levying an income tax, imposed maximum criminal penalties of one year in prison and a fine of *$2,000* for that same offense.[9] Here was a patent inconsistency with Section 3179, which limited the fine to $1,000.[10] It may be that this inconsistency worked a repeal by implication *pro tanto* of Section 3179. *Tyner* v. *United States*, 78 U. S. 88, 92-93; *United States* v.

---

he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

[7] Compare Sec. 29, c. 349, 28 Stat. 509 with Sec. 11, c. 255, 16 Stat. 256.

[8] Sec. 28(8), c. 6, 36 Stat. 11.

[9] Sec. II(F), c. 16, 38 Stat. 114.

[10] The Revenue Act of 1916 (39 Stat. 756) provided the same penalties as that of 1913.

Yuginovich, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Norris* v. *Crocker*, 54 U. S. 429, 439. *Cf. United States* v. *Barnes*, 222 U. S. 513, 520.

The Revenue Act of 1917, after the usual prohibition against false or fraudulent returns added the new offense of "evad[ing] or attempt[ing] to evade any tax" imposed by the act.[11] The Revenue Act of 1918 adopted this modification and further enlarged it to proscribe an attempt to evade the tax "in any manner," raising the maximum fine to $10,000 and retaining the one-year maximum prison sentence.[12] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[13] *The Revenue Act of 1924 made attempted evasion a felony*, punishable by a maximum fine of $10,000 and a five-year maximum prison term.[14] The harsher penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[15] and were incorporated into the Internal Revenue Code of 1939 as Section 145(b). The

[11] Sec. 1004, c. 63, 40 Stat. 300.

[12] Sec. 253, c. 18, 40 Stat. 1057.

[13] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Secs. 1017 (b), (c), c. 234, 43 Stat. 253. Revenue Act of 1926, Secs. 1114 (b), (c), c. 234, 43 Stat. 2, 9. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452.

[14] Sec. 1017 (b), c. 234, 43 Stat. 253. The House bill contained the old penalties but the Senate bill classified attempted evasion as a felony and increased the penalty. The Senate prevailed in conference. See Senate Report No. 398, 68th Cong., 1st Sess., p. 45 and Conference Report in House Report No. 844, 68th Cong., 1st Sess., p. 32.

[15] For citations see fn. 13, *supra*.

overwhelming majority of prosecutions for income tax evasion have, of course, been brought under this Section.

Section 3616(a) of the Internal Revenue Code of 1939 reenacted Section 3179 of the Revised Statutes, making only minor changes in phraseology. If the enacting clause had provided merely that the Code established *prima facie* the internal revenue laws, there might be serious doubt as to the continued applicability of the misdemeanor provision to income taxes in view of the legislative changes that had taken place between 1913 and 1924 (See *Smiley* v. *Holm*, 285 U. S. 355, 373; *United States* v. *California*, 297 U. S. 175, 187; *Cf. United States* v. *Auffmordt*, 122 U. S. 197, 210). **But the simultaneous enactment into positive law[16] of Sections 3616(a) and 145(b) manifests a clear intent, if the plain words of Congress are to be given effect, that the two provisions shall co-exist and that while Section 145(b) applies only to income taxes, 3616(a) applies to all classes of taxes.** (Emphasis added.) On the other hand, it should be noted that Congress enacted the 1939 Code not without some misgivings and that it was intended to be merely a restatement of existing law. It is possible that actually Congress was unaware of the overlap,[17] and intended that the crime of in-

[16] See Sec. 1, c. 2, 53 Stat. 1.

[17] The Chairman of the House Ways and Means Committee reported that the purpose of the bill was to enact into absolute law all the internal revenue laws then in force (84 Cong. Rec. 646). A members of the Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistencies in some form" the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever." (84 Cong. Rec. 74.) Another member of the Committee stated that although the bill might contain "a few minor mistakes" this was bound to occur in the achievement of their broad purpose to "simplify the law for the benefit of the businessmen and the taxpayers of the country." (84 Cong. Rec. 16.) Although there was some protest in the House

come tax evasion should be punishable only under the statute relating specifically to income taxes, *i.e.*, Section 145(b).

We might point out that the Internal Revenue Code of 1954 made a substantial change in Section 3616(a) (re-enacted as Section 7207) in that the existence of a tax deficiency is no longer an essential element of the misdemeanor. In the new Code Congress has once again made clear (for the ninth time since 1924) its intention that wilful attempted income tax evasion shall be *punishable as a felony.* (See Section 7201, re-enacting Section 145(b) of the 1939 Code.)

APPENDIX B

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
WEDNESDAY, MAY 29, 1957

Attorney General Herbert Brownell, Jr., announced today that he has ordered immediate disposition of attempted income tax evasion cases brought under a misdemeanor section of the 1939 Internal Revenue Code.

In doing so, he said that the Supreme Court decision of May 27, 1957, in the *Achilli* case held that the exclusive sanction provided by Congress in such cases is the felony provision of the 1939 Code; and he noted that in rewriting the Code in 1954, Congress had revised the misdemeanor section of the 1939 Code, known as section 3616(a), in such

---

that "no one has read the bill" and that there had been no hearings (84 Cong. Rec. 787-788), the bill was passed in reliance upon the work of "as fine a lot of experts as can be found" and the care and time which had been spent in compiling the Code. (84 Cong. Rec. 74.)

The Senate Committee on Finance reported that the bill made "no changes in existing law" and pointed out that "if any error is found in the Code, it can be remedied by amendatory legislation." (Senate Report No. 20, 76th Cong., 1st Sess., 1056-1057.)

a manner that it has not been applicable to attempted evasions occurring since August 1954.

He said that the appropriate United States Attorneys were instructed to initiate immediate action to effect the release of four persons serving prison sentences as a result of conviction under the misdemeanor section. An estimated 50 cases pending under the same section will be dismissed.

Section 145(b) of the 1939 Code makes it a felony to attempt to evade income taxes. Section 3616(a) of the 1939 Code made it a misdemeanor to deliver or disclose to a collector or deputy any false or fraudulent return with intent to defeat or evade the assessment. The Supreme Court held that section 3616(a) was not applicable to attempted income tax evasions and that Congress intended that such cases should be brought under the felony section, 145(b).

The misdemeanor statute had been used in a small percentage of income tax evasion cases in recent years, where the unreported income involved was small in amount, in practically all cases under $1,000. Those serving sentences whose release will be sought by the United States Attorneys upon proper application to the appropriate United States District Court are:

Leroy C. Daniel, Hempstead, New York, sentenced March 4, 1957, to three months, and serving in the Detention Headquarters, New York City.

Tommie Daniels, Tampa, Florida, sentenced September 19, 1956, to one year, and serving in the Federal Correctional Institution, Tallahassee, Florida.

Jimmie Lee Johnson, Tampa, Florida, sentenced November 21, 1956, to one year, and serving at Tallahassee.

George H. Peters, Pittsburgh, Pennsylvania, sentenced January 3, 1957, to 12 months, and serving in the Federal Prison Camp at Allenwood, Pennsylvania.